

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
Southern California Water Company
(U 133 W) for an Order pursuant to
Public Utilities Code Section 851
Approving a Settlement Agreement that
will Convey Water Rights in the Culver
City Customer Service Area.

Application 02-07-021

**REPLY COMMENTS
OF THE OFFICE OF RATEPAYER ADVOCATES
ON THE ALTERNATE PROPOSED DECISION
OF COMMISSIONER LYNCH**

The Office of Ratepayer Advocates (ORA) files these reply comments on Commissioner Lynch's Alternate Proposed Decision (Alternate) pursuant to Rule 77.2 and Chief ALJ Minkin's April 8, 2004 cover letter.

I. RESPONSE TO SCWC'S COMMENTS

**A. The Record Does Support A Finding That SCWC's
Water Rights In the Charnock Basin May In The
Future Be Necessary Or Useful**

The Southern California Water Company (SCWC) argues that Commissioner Lynch's Alternate depends on the characterization as "speculative" of SCWC's testimony about the future usability of the Charnock Basin groundwater. SCWC notes that its expert testified that the groundwater may never be usable again, and takes umbrage at the characterization of that testimony as "speculation". However, any forecast about the future and groundwater utilization

is by its very nature speculative. SCWC protests too much about the choice of language in the Alternate. We certainly find no legal error here.

In fact, the record does support the Alternate's finding that SCWC's groundwater rights were, are presently, and may in the future be necessary or useful to water consumers. The most striking evidence is the amount of money that the City of Santa Monica has agreed to pay for these water rights. SCWC has not satisfactorily explained why the City would be willing to pay over \$6 million for water rights that are useless.

Furthermore, ORA witness Han testified that in his professional judgment it was likely that the MTBE pollution that currently prevents use of these wells is likely to be cleaned up in the future and that the Charnock Basin and will again be a valuable, low cost source of water, once the MTBE contamination is cleared up. In his judgment, this is an asset that should be considered necessary and useful for ratepayers of SCWC's district.¹ What the record shows is not the uncontested agreement that this cleanup will not occur, as SCWC suggests, but a difference of opinion between two experts. The Commission has a record that can and does support the Alternate's findings.

B. The Alternate Correctly Allocates The Net Gain On Sale To Ratepayers

SCWC argues that (1) the gain on sale for all the payments to SCWC is governed by P.U. Code § 790, and (2) if it is not governed by § 790, the Commission should defer allocating the gain on sale to the generic rulemaking on gain on sale. The Commission should reject both of these arguments.

First, the transaction between SCWC and the City of Santa Monica (City) is *not* covered by P.U. Code § 790 for a variety of reasons. As the Alternate finds, the assets sold were still necessary or useful to SCWC's ratepayers. Furthermore, as ORA pointed out in our opening comments, the Assignment Payment

¹ Exh. 13 at 6-7.

associated with the Charnock Basin plant involved no *sale* of property, but is instead damage payments for the reduced value of that property, and since there is no sale, the payment does not come under P.U. Code § 790.

In our opening comments, ORA argued that since the payments do not come under § 790, the Commission has discretion in how to allocate both the gain on sale and the damages payments. SCWC claims that equitably the shareholders should receive all the gain because “ratepayers have not borne the costs of maintaining the water rights over the years”. The principle costs that SCWC identified in the hearings associated with maintaining the water rights involved SCWC’s litigation and technical consulting fees in the litigation against the Potentially Responsible Parties. However, ORA agreed that SCWC should recover its legal costs involved in the litigation against the Potentially Responsible Parties from the proceeds of this transaction. We pointed out in our opening comments that the equitable arguments for allocating these payments to ratepayers since it is the ratepayers that are going to be paying the higher rates for purchased water in the future.

We see no need to defer the ratemaking for this case to the generic rulemaking. This case has a unique set of facts that is unlikely to be repeated in future water cases. The Commission has all the information it needs to make a decision on the ratemaking at this time for this specific transaction.

II. RESPONSE TO THE COMMENTS OF THE CALIFORNIA WATER ASSOCIATION

The California Water Association (CWA) has moved at this very late hour to intervene in this proceeding and file comments. Notwithstanding the fact that the application of P.U. Code § 790 has been a major issue in this proceeding ever since ORA filed its protest, CWA chose to file no testimony, conduct no cross-examination, file no briefs, and file no comments on the Proposed Decision.

A. CWA’s Citation Of The PD’s Findings As Evidence Is Boot-strapping

In its comments, CWA argues that “the evidence is clear that SCWC’s Charnock Basin water rights ...were currently not ‘necessary or useful’ in the performance of the water corporation’s duties to the public,” due to pervasive effects of MTBE contamination.” However, CWA does not cite any evidence. Instead it simply parrots the contested findings of the Proposed Decision, as if, by sufficient repetitions, such proposed findings can themselves become evidence.

CWA would have the Commission characterize a forecast that the Charnock Basin will be useful to water consumers in the future as speculative, but the opposite forecast *not* to be speculative but persuasive evidence. CWA’s comments fail to address adequately why the City would pay so much money for SCWC’s water rights if the City did not think the Charnock Basin could be cleaned up in a cost-effective way.

CWA argues (at 5) that the status of water corporation property as “‘necessary or useful’ must be judged based on historical and current circumstances—not speculation as to future events.” Under this standard, any interruption in use of an asset would render it not “used or necessary”. This is not the standard that the Commission typically applies. Indeed, the Commission has for decades allowed in rate base plant held for future use, even if the property at present is not being used for utility functions.

B. CWA’s Other Factors Hardly Suggest That SCWC’s Ratepayers Should Be Rewarded With The Gain On Sale

CWA argues (at 6) for SCWC stating:

In short, the “the City’s willingness to pay” does not prove that SCWC’s water rights were “necessary or useful” for utility service, but only that SCWC’s litigation strategy presented a barrier to the City achieving its own litigation goals.

The City's "litigation goals" involve cleaning up the Charnock Basin, upon which the City was far more dependent than SCWC. SCWC's claim of water rights stood in the way of the Potentially Responsible Parties reaching an agreement to clean up the groundwater. Even though SCWC had no plans of its own to clean up the groundwater, instead simply enjoying the monthly payments from the Potentially Responsible Parties, SCWC saw an opportunity to extract a large nuisance payment from the City to get out of the City's way in the litigation that was designed to end up cleaning up the Basin. ORA submits that SCWC should not be rewarded for such action by been allocated the gain on sale.

III. CONCLUSION

For the above reasons, ORA urges that the Commission adopt the Alternate Decision, as modified in the manner described in ORA's opening comments on the Alternate Decision.

Respectfully submitted,

/s/ JAMES E. SCARFF

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May 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document
**“REPLY COMMENTS OF THE OFFICE OF RATEPAYER ADVOCATES ON
THE PROPOSED ALTERNATE DECISION OF COMMISSIONER LYNCH”**
in A.02-07-021.

A copy was served as follows:

[X] **BY E-MAIL:** I sent a true copy via e-mail to all known parties of record
who have provided e-mail addresses.

[X] **BY MAIL:** I sent a true copy via first-class mail to all known parties of
record.

Executed in San Francisco, California, on the **3rd** day of **May, 2004**.

/s/ REBECCA ROJO

Rebecca Rojo